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December 12, 2003

BY ELECTRONIC DELIVERY

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Ex Parte

Re: *Petition for Declaratory Ruling of pulver.com,*
WC Docket No. 03-45

Dear Ms. Dortch:

Attached is a letter from Henry G. Hultquist, MCI, to Michelle Carey, Chief, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission. Pursuant to the Commission's rules, 47 C.F.R. § 1.1206(b), this letter is being provided to you for inclusion in the public record of the above-referenced proceeding. Please do not hesitate to contact me if you have any questions regarding this submission.

Sincerely,

/s/ A. Renée Callahan

A. Renée Callahan

Attachment

cc: Michelle Carey
Cathy Carpino
Tom Navin
Brent Olson
Jeremy Miller



December 12, 2003

Ex Parte

Michelle Carey, Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
Washington, DC 20554

Re: FCC Jurisdictional Authority Over pulver.com's FWD Service

Dear Ms. Carey:

On February 5, 2003, pulver.com asked the Commission to declare that its Free World Dialup ("FWD") service does not constitute "telecommunications" or a "telecommunications service" under the Communications Act of 1934, as amended ("Act"), and, thus, is not subject to the Commission's Title II authority.¹ Among other issues, the Petition raises the question of whether state commissions have authority to regulate Internet applications of the type described in pulver.com's request. As discussed in more detail below, pulver.com's Free World Dialup service appears to be an information service, which the FCC has previously concluded may not be regulated by state commissions. Even assuming, *arguendo*, that the Commission were to conclude erroneously that FWD is a telecommunications service, it would be impossible to separate the interstate and intrastate components of the service. Consequently, under the agency's well-established inseverability doctrine, state commissions should be barred from regulating FWD under those circumstances as well.²

In the *Computer II* proceeding, the FCC concluded that information services (then referred to as enhanced services) are not common carrier services, subject to the Commission's Title II jurisdiction. Rather, the FCC ruled that such services fall within

¹ See Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service, WC Docket No. 03-45, at 1 (filed Feb. 5, 2003) ("Petition").

² See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986).

the ambit of the agency's ancillary jurisdiction under Title I.³ In order to promote the continued development of such innovative services, the FCC not only declined to regulate those services, but also preempted state commissions from attempting to regulate them.⁴ Because Free World Dialup service appears to be an information service under the Act, the FCC should conclude that FWD service is not subject to the agency's Title II jurisdiction and may not be regulated by state commissions.

The Petition describes FWD as an Internet application that allows broadband Internet subscribers to engage in real-time voice communications with other broadband Internet subscribers via Session Initiation Protocol (SIP) telephones or personal computers that are SIP-enabled.⁵ Registered users of FWD interact with an information source (such as a server) that enables them to identify other members who are on-line and to place calls to those members using a private dialing plan from anywhere in the world where they can obtain a broadband Internet connection. Thus, it appears that FWD is an application that involves the real-time exchange of packets between two endpoints on the public Internet. As such, the service would appear to be functionally equivalent to an Instant Messaging (IM) service. IM services similarly involve users interacting with an information source that both identifies users who are on-line and also enables subscribers to exchange messages with one another in real time. Consequently, FWD appears to be an information service that state commissions are preempted from regulating.

Even assuming, *arguendo*, that the FCC were to conclude wrongly that FWD is a telecommunications service, the FCC should preempt state commissions from regulating such services under the agency's inseverability doctrine. In determining the jurisdiction of traffic that traverses traditional circuit-switched networks, the FCC typically has looked to two end points of the call. As the U.S. Court of Appeals for the D.C. Circuit previously has observed, however, that line of analysis is unsuitable for determining the jurisdiction of Internet-based communications services.⁶ In the case of FWD, in particular, it would be useless to attempt to apply the traditional end points approach, because there is no reliable way to determine the physical locations of the end users. In other words, it is impossible to "separate the interstate and intrastate components" of the transmission.⁷ Faced with similar circumstances in the past, the Commission has applied

³ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, ¶ 132 (1980).

⁴ *Id.*

⁵ Petition at 2-4. SIP is a signaling protocol that supports IP-based voice communications. In addition, members are not assigned telephone numbers in accordance with NANP.

⁶ *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000).

⁷ *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. at 375 n.4.

the inseverability doctrine to preempt state commissions from regulating the service involved.⁸

In sum, pulver.com's FWD service appears to be an information service, functionally indistinguishable from an Instant Messaging service. As such, FWD is subject to the FCC's ancillary Title I jurisdiction and is not subject to regulation by state commissions. Even if the FCC were to find erroneously that FWD is a telecommunications service, the agency should make clear that states are preempted from regulating such services under the inseverability doctrine.

Sincerely yours,

/s/ Henry G. Hultquist
Henry G. Hultquist

⁸ See *id.* (under the inseverability doctrine, preemption of state regulation is permissible "where it [is] *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation"); see also *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977). Even for telecommunications services (and FWD cannot credibly be termed a telecommunications service), the identification of jurisdiction as either interstate or intrastate has become much less important in light of the Telecommunications Act of 1996. There, Congress made clear that the FCC has the authority under Section 201(b) to take any steps necessary to implement the local competition provisions of the Act without regard to the traditional lines between intrastate and interstate services. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-380 & n.6 (1999) ("[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.").